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Nos. 85-441 and 85-460

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

IRVING GILBERT, *et al.*, and
LILLIAN ROBERTS, as Commissioner of Labor
of the State of New York,

Appellants,

—against—

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT SUPPLEMENTAL BRIEF OF APPELLANTS IN RESPONSE TO BRIEF OF UNITED STATES

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THE SOLICITOR GENERAL HAS NEITHER RESOLVED NOR MINIMIZED THE NEED TO RESOLVE THE QUESTIONS RAISED BY APPELLANTS

Introduction

The brief submitted by the United States as amicus curiae in response to the *Gilbert* and *Roberts* appeals does not resolve the issues raised by appellants or clarify the state of the law.[1] Indeed, the arguments it addresses are not the arguments appellants have raised; they are not even arguments to which appellants subscribe.

I.

The Question Presented by Appellants: What Is a Plan?

The United States mistakenly assumes that the question that appellants have posed is whether "ERISA only covers plans that are separately funded." (SG at 4, 15 n. 17). *That is not the question.*[2] The question is not

[1] The Brief of the United States as Amicus Curiae shall hereinafter be referred to as "SG".

[2] Indeed, appellants never made this argument. To the contrary, appellants argued to both the district and circuit courts in this case that the difference between subparagraphs (A) and (B) of § 1002(1) was that the former covered unfunded plans and the latter, funded plans—thereby recognizing that the Act covers both.

Since appellants are not pressing this distinction on appeal and are *not* arguing that severance plans must be funded in order to be covered by the Act, see 85-460 J.S. at 7-8 n.7, the portion of the Solicitor General's brief which addresses this contention is totally besides the point. (This constitutes fully 60% of the Solicitor General's argument; *see* SG at 9-15 and 18-21).

Appellants are posing a much more fundamental question: what is a *plan?* And, what does it mean for one to be *established* within the meaning of the Act?

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whether a plan must be funded in order to be considered a covered welfare plan, but what a plan *is* in the first place. To this question, the United States has no answer.[3]

II.

Congress Answers the Question.

The term "plan" has two different, but related senses as used in the Act.[4] In some instances, it clearly refers to an entity from which employees are entitled to receive benefits. In this sense a "plan" is an entity like a trust,

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While the creation of a fund may provide evidence of a plan's having been established, it is neither a *sine qua non* of the plan's existence nor a prerequisite to its establishment. Simply put, a welfare plan may be funded, underfunded or *un*funded; what matters is not the level at which it is or is not funded, but its *existence*. That alone is determinative of ERISA jurisdiction and federal pre-emption. *See* n. 20, *post*.

[3] To the extent that it may be said to address this question at all, all it does is rely upon a series of tautologies to the effect that a 'plan is a plan is a welfare plan.' *See, e.g.*, SG at 4 ("severance pay *plans* would in virtually all cases be welfare plans"); SG at 5 ("welfare plans include *plans* that pay severance benefits"); SG at 21 ("as we have shown, Congress plainly intended ERISA to cover severance pay *plans*").

Appellants agree: ERISA covers both severance pay plans and other types of *plans*. The question, however, is—are there any benefit policies or practices that are *not* plans and, therefore, *not* covered by ERISA. Appellants are certain there are: *e.g.*, an employer's naked promise, without more, to pay any type of welfare benefit; an employer's personnel policy or compensation practice; the provisions of an employee handbook, etc. . . .

The United States does not discuss this question. It simply *assumes* that because the Act covers unfunded plans, it also covers employer personnel policies. As will hereinafter be seen, the two *cannot* be equated. An employer compensation or personnel policy is not a "plan."

[4] The term "plan" as used throughout the Act is synonymous with the phrase "plan, fund, or program" as that phrase is used in 29 U.S.C. §§ 1002(1) and 1002(2)(A). *See* 29 U.S.C. § 1002(3), and then §§ 1002(1) and 1002(2)(A).

which, although it may have no assets, has a clearly defined structure and an existence separate from both its trustees and beneficiaries.[5] In other instances, the word "plan" refers to the instrument which governs the operation of that entity and spells out the relationship between the entity and its participants. In this sense, a "plan" is like a trust agreement or indenture under the terms of which trustees and beneficiaries are given rights and obligations.[6]

There can be no mistaking the fact that "plans" have a dual aspect to them because, on the one hand, the Act clearly contemplates that a plan will be able to:

—employ persons, *see* §§ 1023(c)(3) and 1002(14),

—own property or other assets, *see* §§ 1023(b)(3) and 1002(21)(a),

—receive contributions, *see* § 1002(37)(A)(i),

—receive other financing, *see* § 1022(b),

—maintain books and records, *see* §§ 1022(b) and 1023(a)(3)(A),

—file annual reports, statements of assets and liabilities and financial returns, *see* §§ 1023(a)(4)(A) and 1023(b)(4),

—be a party to various transactions, *see* § 1023(b)(3)(H), and

—sue or be sued, *see* §§ 1132(d)(1) and 1002(19).

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[5] Appellants do not contend that the entity must in fact be a trust. Indeed, appellants assume the contrary, i.e., that ERISA covers many entities which, although trust-*like*, have not been so established as to meet the technical requirements for the establishment of a trust under state law.

Indeed, it was *precisely* because employees were unable to employ the common law of trusts to recover benefits from their plans that ERISA was enacted in the first place. The statute provided a remedy where none had existed before.

[6] Similarly, appellants do not contend that the instrument must actually be a trust agreement. *See* n. 5, *ante*.

On the other hand, the Act just as clearly contemplates that a plan will have terms under which a participant or beneficiary will be able to "recover benefits," "enforce rights," and "clarify . . . rights to future benefits."[7] 29 U.S.C. § 1132(a)(1)(B).

Therefore, in order for a plan to have been established or be maintained within the meaning of the Act, there must be both an entity from which, and instrument under which, participants can recover benefits.[8]

The entity and instrument that the Act contemplates are not just *any* entity and *any* instrument, however. The Act contemplates an entity which has a structure and identity separate from that of its sponsor, and an instrument which governs the operation of the entity and its relationship to third paries.

1. *A Plan Is an Entity Separate From the Employer.*

At a minimum, the Act contemplates that in order for an employee benefit plan to be established or maintained, it must have an identity, practically and juridically speaking, separate from that of an employer which establishes it.[9] A separate identity is the *sine qua non* of the plan's

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[7] *See, e.g.*, 29 U.S.C. §§ 1002(8), 1002(14)(C), 1002(14)(D), 1002(19), 1002(22), 1002(24)(A), 1002(37)(A)(iii), 1022(a)(1) and (2), 1022(b), 1023(a)(2)(A), 1023(b)(1), 1023(c), wherein the Act contemplates that a plan will contain certain provisions, describe certain procedures, define certain rights and obligations, etc.

[8] In the case of a welfare plan, there must be an entity from which, and instrument under which, participants can recover the benefits enumerated in § 1002(1)(A) or "described in § 302(c);" in the case of a pension plan, there must be an entity from which, and instrument under which, participants can recover pension benefits.

[9] *See, e.g., Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 567 F.2d 692, 699 (7th Cir. 1977); *Taggart Corp.* v. *Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Hamberlin* v. *VIP Insurance Trust*, 434 F.Supp. 1196 (D.Ariz. 1977).

existence. Even the most cursory examination of the Act supports this thesis.

The Act not only assumes that a plan is an entity, but that employers, participants and beneficiaries exist in relation to it. Compare, in this regard, the statutory definitions of the terms, "employer" and "participant":

> "(5) (t)he term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, *in relation to an employee benefit plan* . . ."
>
> * * *
>
> "(7) The term "participant" means any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type *from an employee benefit plan* which covers employees of such employer . . ."

29 U.S.C. §§ 1002(5) and (7) (emphasis added). These definitions only make sense if a plan has a structure separate from that of its sponsor.

Even clearer in this regard are sections 1132(d)(2), 1106(a) and 1107 of the Act. Section 1132(d)(2) provides that a money judgment against a plan shall be enforceable only against the plan and not against the employer that established it,[10] and §§ 1106(a) and 1107 prohibit transactions *between* a plan and its sponsoring employer. The provisions, therefore, presume the separateness of the employer and plan.[11]

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[10] 29 U.S.C. § 1132(d)(2) provides that "[a]ny money judgment . . . against an employee benefit plan shall be enforceable *only* against the plan as an entity and shall not be enforceable against any other person . . .". (Emphasis supplied). The term person is defined in § 1002(9): it includes a corporate employer. The United States has either overlooked or mistaken the meaning of these provisions, *see* SG at 19 n. 19.

[11] Appellants do not contend, as the district court below assumed they did and as the United States still assumes, that

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2. *A Plan Is Also the Instrument Which Governs That Entity.*

In addition to being an entity with a distinct *persona,* a plan is also the instrument which defines and governs the relationship between that entity and its participants. This is necessarily so since it is *under the terms of their plan* that participants and beneficiaries are entitled to recover benefits from the *plan entity,* and enforce rights against it. *See* 29 U.S.C. §§ 1002(7), 1002(8), 1132(a), 1132(d)(1), 1132(d)(2) and 1002(9). Thus, every "plan" must have a "plan" or plan instrument.[12]

3. *A Simple Employment Contract Is Not a Plan Within the Meaning of the Act.*

It follows from our two initial theses that there is a basic but meaningful distinction between a simple personnel policy or employment contract, on the one hand, and a "welfare plan," on the other. The first sets forth rights and obligations which inhere between employer and employee. The second sets forth rights and obligations which inhere between a plan and its participants. ERISA governs only the plan-participant relationship and not the employer-employee relationship.

Thus, where a document, policy or agreement creates only rights and obligations between an employer in his capacity as an employer and his employees *qua* employees, it does not constitute an "employee benefit plan" or "plan" within the meaning of the Act.

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Burlington cannot be said to have established or maintained a "plan" within the meaning of the Act because it didn't comply with the statute's fiduciary, disclosure and reporting requirements. (A-29 and SG at 17-18). On the contrary, appellants contend that Burlington cannot be said to have established or maintained a "plan" because it never created an entity or institution *capable* of complying with those provisions.

[12] To be a plan instrument, a document must establish an entity separate from the employer as the mechanism through which benefits are provided.

It necessarily follows that any laws which are invoked to enforce rights and obligation under and in accordance with such a document are not pre-empted by ERISA. This is so because the liability being asserted is neither *against* any plan nor under the *terms* of any plan. As applied, therefore, such laws do not relate "to any employee benefit plan." [13]

Nachman Corp. v. *Pension Benefit Guaranty Corp.* and *Murphy* v. *Heppenstall* recognize these three basic, but critical, distinctions, i.e.: the distinction between plans and employers, between plan instruments and employer personnel policies or employment contracts, and between plan liability and an employer's direct contractual liability. (*See* 85-441 J.S. at 10-15; 85-460 J.S. at 18-23; Jt. Brief in Opp. to Motion to Dismiss or Affirm at 7-8). *Donovan* v. *Dillingham,* 688 F.2d 1367 (11th Cir. 1982), on the other hand, upon which the United States relies, does *not* recognize these distinctions.[14] It had no occasion to.[15]

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[13] *See* 29 U.S.C. § 1144(a). It is significant to note that this is true, and that there is no pre-emption, whether the causes of action that the employee asserts are asserted under federal law, state law, common law or statutory law. Thus, the fact that the contract claims that were involved in *Nachman* and *Murphy* were *federal* instead of state law claims is irrelevant to the issues before this Court. (*See* S.G. at 20 n. 19, wherein the Solicitor General argues to the contrary.)

[14] It is interesting to note that in the brief the Secretary of Labor submitted to the Ninth Circuit in the *Henning* case, the Secretary criticized the district court for having "followed an irrelevant tack when it applied the definition of [the terms "plan, fund or program"] developed in *Donovan* v. *Dillingham* . . ." According to the Secretary, "*Dillingham* did not reach the central question" of whether the vacation pay arrangement involved in *Henning* was an employee welfare benefit plan. (Brief of Secretary of Labor as Amicus Curiae, *Calif. Hosp. Ass'n* v. *Henning,* 770 F.2d 856 (9th Cir. 1985), at 33 n. 24).

[15] The question presented in *Donovan, supra,* was whether the trustees of a multi-employer insurance trust, which purchased group health insurance for subscribing members at rates more

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Thus, it is to *Nachman* and *Murphy*, and not to *Donovan* v. *Dillingham*, that the Court should look when considering the questions presented by this appeal.

III.

The United States Department of Labor's Answer Is Not an Answer.

While the Department of Labor attempted in its "payroll practices" regulation to develop a coherent response to the many questions that have arisen regarding ERISA's coverage, the benefit-by-benefit approach which it adopted to resolve these questions is neither workable nor consistent with the statute.

The approach is inconsistent with the statutory scheme and underlying legislative intent because ERISA is not a statute about *types* of benefits, but about regulating specific *methods of providing benefits*.[16] To the extent the Department's regulations read the term "plan" out of the Act, therefore, and make ERISA coverage turn solely on the type of benefits employees are being offered, the regulations have the effect of amending the statute, not implementing it.

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favorable than those offered directly by insurers, were subject to the provisions of ERISA regarding fiduciary duties. The court was not faced with determining whether a simple personnel policy or promise of benefits was a "plan" within the meaning of the Act and, therefore, had no occasion to consider the questions, and make the distinctions, raised by appellants.

[16] Those who argue for determining ERISA's coverage by comparing the benefit being provided in any given instance with the list of benefits set forth in § 1002(1) do so on the assumption that Congress has federalized the entire field of employee benefits. (This will hereinafter be referred to as the "benefits approach".) Those who argue for or apply a structural approach, as appellants have, do so on the assumption that there has been a functional division of authority—in which federal law governs employee benefit plans and state law, an employer's direct contractual liability. (*See* 85-460 J.S. at p. 24, ¶ 6 and App. E, Models A and B, appended to 85-460 J.S.).

The Department's benefit-by-benefit approach is also unworkable because it leads to the type of inconsistent results exemplified by the decisions in *California Hospital Ass'n* v. *Henning*, 770 F.2d 856 (9th Cir. 1985), *pet. for cert. filed*, Doc. 85-1648 (1985), and *Gilbert* v. *Burlington Industries, Inc.*, 756 F.2d 320 (2d Cir. 1985), *separate appeals filed*, Doc. Nos. 85-441 and 85-460 (1985). Both cases involve benefits covered by 29 U.S.C. § 1002(1),[17] and employer promises to provide these benefits through mechanically implemented payroll practices. Yet, the policies in *Gilbert* were held to be ERISA-covered "employee welfare benefit plans", while the policies in *Henning* were not.[18]

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[17] *Henning* involves accrued vacation benefits, and *Gilbert* involves payroll and vacation severance benefits. The benefits are indistinguishable: both are payable only upon termination of employment. Both are "covered benefits" under section 1002(1).

[18] Had a strict "benefits approach" been applied, the results in the two cases would have been the same. That is, the courts would have found that the policies involved in both cases were "employee welfare benefit plans" since the benefits being provided are both benefits enumerated in § 1002(1).

The results would *also* have been consistent had the structural approach appellants have argued for been applied. Under this approach, however, the courts would have found that *neither* case involved an "employee welfare benefit plan" because the policies under which the benefits were promised are *not plans* within the meaning of the Act.

The fact that a split-decision was rendered results from the fact that the United States Department of Labor has adopted a modified form of "benefits approach." Under this approach, it first compares the benefit being provided with the list of benefits set forth in § 1002(1). If the benefit is covered by the statute, it is then compared with the list of excluded benefits set forth in the Department's "payroll practices" regulation, 29 C.F.R. 2510.3-1(b). Where the benefit is listed in the statute, but *not* in the regulation, as was the case in *Gilbert*, then ERISA is said to cover the benefit, regardless of the method by which it is provided. Where the benefit is listed in both the statute *and* the regulation, as was the case in *Henning*, then the mention of the benefit in the regulation is said to nullify its specific inclusion in the statute. Under this approach, the question of coverage can be resolved differently *despite* the fact that two types of benefits are both referred to in § 1002(1). This result is indefensible.

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To defend this inconsistency, as the Department of Labor does, on the ground that *Henning* involved a benefit that was denominated a "vacation benefit", while the benefit in *Gilbert* was denominated a "severance benefit", is to exalt *names* over both form *and* substance.[19]

Unless and until it is recognized that the scope and coverage of the Act must be determined in accordance with a two-step *structural* approach, as opposed to a one or two-step *benefits* approach,[20] the emergence of such inconsistent, arbitrary and ad hoc rulings will continue. The fact that the Department of Labor is content to continue to preside over this confusion, and to rule on benefits on an ad hoc basis, is no answer. The basic threshold definitional questions which appellants have raised must be resolved.

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The question of which of the two basic approaches to ERISA coverage—the structural approach or the benefits approach—is the *correct* one is the question to be answered by this Court. The Department's approach is untenable.

[19] The Department's position is anomalous. Either its payroll practices regulation is *under-inclusive* because *no* personnel policies or payroll practices are covered by the Act, regardless of the benefit involved, *or* the regulation is in *direct conflict* with the statute because it exempts from the statute's coverage practices to which it was specifically meant to apply. (*See* discussion at pp. 4-6 of the Joint Brief of Appellants in Opposition to Motion to Dismiss or Affirm.)

[20] The two-step process mandated by the statute entails the following: First, it must be determined whether a "plan, fund or program" has been established or maintained within the meaning of the Act, because the existence of such a "plan, fund or program" is a prerequisite to the creation of an "employee welfare benefit plan." 29 U.S.C. § 1002(1). *See also* footnote 4, *ante*. Second, assuming the existence of a "plan," it must then be determined whether the plan qualifies as an "employee welfare benefit plan." This is dependent upon whether the benefit being provided by way of the plan is a "covered" benefit under subparagraphs (A) and/or (B) of § 1002(1). The Department of Labor, like the courts in *Gilbert* and *Henning*, have ignored the critical first step.

IV.

The Questions Presented by Appellants Merit Plenary Consideration.

While everyone agrees that Congress intended to "occupy the field," everyone disagrees as to *which* field Congress intended to occupy.

The Ninth Circuit disagrees with the Second Circuit. (*Cf.* the *Henning* and *Gilbert* decisions.) The federal courts disagree with the state courts. (*Cf.* Appendices B and D to 85-460 J.S.) The state attorneys general disagree with the Solicitor General. (*Cf.* Brief of the States as Amici Curiae Supporting Appellants with the Brief of the United States as Amicus Curiae.) Appellants in *Gilbert* disagree with petitioners in *Henning,* and the United States Department of Labor disagrees with both. (*Cf.* 85-441 J.S. and 85-460 J.S. with 85-1648 J.S.).

Nothing will be gained by prolonging the current state of confusion, and much will be lost.[21]

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[21] Indeed, it is with ill grace that the United States argues in its amicus brief that it should be permitted to continue to preside over a jurisdiction which, to appellants' knowledge, the Department of Labor has *never* sought to exercise—that is, jurisdiction over simple employer personnel policies. To dismantle a state apparatus, which has long met employees' needs in this regard, without first providing a realistic alternative *and* without first determining whether this result is mandated by statute, would be irresponsible. At present, neither the United States Department of Labor nor the federal courts are equipped to handle the many thousands, if not ultimately hundreds of thousands, of benefit claims with which they will be deluged if the basic premises upon which the federal courts are currently operating concerning ERISA are not reconsidered.

CONCLUSION

For the reasons stated, the questions presented by these appeals, and by the petitions and appeals in *Henning* and *Holland,* should be given plenary consideration.

Respectfully submitted,

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